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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-667

THE SCHOOL BOARD OF
THE CITY OF NEWPORT NEWS, VIRGINIA, *et al.*,

Petitioners,

—v.—

FRANK V. THOMPSON, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

HENRY L. MARSH, III
S. W. TUCKER
JAMES W. BENTON, JR.
214 East Clay Street
Richmond, Virginia 23219

PHILIP S. WALKER
1715 25th Street
Newport News, Virginia 23607

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents

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Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit, filed August 2, 1972, is now reported at 465 F.2d 83. The unreported August 12, 1971 oral opinion of the District Court and its order endered August 23, 1971, are reprinted at pp. 15 and 23, respectively, of the Appendix to the Petition.

There are no prior reported opinions in this case; however, opinions in a predecessor action, *Adkins* v. *School Board of Newport News,* are reported at 148 F. Supp. 430 (E.D. Va.), *aff'd* 246 F.2d 325 (4th Cir.), *cert. denied,* 355 U.S. 855 (1957).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether residential segregation in Newport News, which predated the commencement of this litigation and which continues virtually unabated to any substantial degree, excuses the school authorities from dismantling segregated units of their former dual school system which are located in segregated neighborhoods.

(2) Whether the courts below erred in holding that a freedom-of-choice plan had failed to bring about effective desegregation of the Newport News public schools.

(3) Whether the Court of Appeals erred in remanding, for further findings, the District Court's action exempting all first- and second-graders from inclusion in the desegregation process, irrespective of the particular time or distance any individual student or group of students of any age might have to be transported.

(4) Whether a school system which previously transported nearly 70% of its enrollment may avoid effectively desegregating its schools because it contends that transportation of students to achieve desegregation will subject them to dangerous conditions because of congested traffic patterns.

Statement of the Case

The essential facts concerning this matter are as follows:

This suit was commenced July 23, 1970 to desegregate the public schools of Newport News.[1] Proceedings were initially deferred pending this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971); thereafter, the School Board submitted a plan calling for retention of freedom-of-choice at the secondary school level, and "neighborhood" (generally segregated) zoning for elementary schools. The Board also presented an alternate secondary plan (which it did not favor) utilizing pairing and non-contiguous zoning to desegregate all secondary facilities in the system.

Following a hearing, the District Court on August 4, 1971 rejected the Board's proposal to continue freedom-of-choice at the secondary level but accepted the alternate secondary desegregation plan. At the same time, the Court

[1] A decade before, black schoolchildren had brought suit to declare unconstitutional the Virginia pupil placement laws enacted in response to *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); 349 U.S. 294 (1955), and to start the process of desegregation in Newport News. *Adkins* v. *School Bd. of Newport News*, 148 F. Supp. 430 (E.D. Va.), *aff'd* 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957). Following merger of the Cities of Warwick and Newport News in 1958 (Petition, p. 9), a second suit seeking the same relief was brought against the new entity, *Adkinson* v. *School Bd. of Newport News*, Civ. No. 642 (E.D. Va., Newport News Div'n, filed September 3, 1958). These suits did not result in orders for system-wide desegregation and their prosecution languished in the 1960's. Following enactment of the Civil Rights Act of 1964, 42 U.S.C. §§2000d *et seq.*, the Newport News school system adopted a freedom-of-choice plan. This proved ineffective as a desegregation device and the U.S. Department of Health, Education and Welfare had virtually completed procedures to terminate federal funding to the district when the District Court's order in the instant case was entered. *See* U.S. Dep't of H.E.W., *Status of Title VI Compliance: Interagency Report*, Cumulative List No. 254, p. 4 (Docket No. CR 669).

required submission of a new elementary plan by the school system. This plan, ultimately approved by the District Court, retained "neighborhood" zoning for students in grades 1 and 2 while utilizing non-contiguous pairing to desegregate the remaining elementary grades.

Both parties appealed: the School Board claiming it had been required to do too much, and the plaintiffs that a unitary school system could not be achieved under the plan approved by the District Court. In the meantime, both the Board's alternate secondary school and revised elementary school desegregation plans were implemented commencing with the 1971-72 school year.

On August 2, 1972, the United States Court of Appeals for the Fourth Circuit, sitting *en banc,* rejected the Board's appeal virtually in its entirety and remanded the case to the District Court with instructions to make findings concerning two issues raised by plaintiffs: whether under the School Board's elementary plan, as to the grades it affected, black students were bearing a disproportionate share of the burden of desegregation; and whether any sufficient ground existed to eliminate the first and second grades from the desegregation process, particularly if the plaintiffs could present a viable and practicable alternative elementary plan including those grades.

Reasons Why the Writ Should Be Denied

Petitioners attack the desegregation order of the District Court on every possible ground, contending: that they did not operate a dual school system, that in any event the Court was bound to permit continuation of a free choice plan which had not effectively desegregated their schools, that Newport News streets and highways are so grossly inadequate to transport students to desegregated schools

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that the District Court exceeded its remedial equitable authority by ordering a plan requiring pupil busing, and finally, that the Court of Appeals should not have required further findings to justify blanket exemption of first- and second-grade students from whatever plan of desegregation is required to be implemented.

I.

The first two and last two "Questions Presented" described in the Petition (pp. 2-3), and the confusing discussion at pp. 13-23 thereof, represent an attempt by the Petitioners to cloud the remedial issues of the case by making the bald and unsupportable claim that no violation of the Fourteenth Amendment was shown warranting relief in the nature of that authorized by this Court in *Swann*. The School Board presents alternate theses to support this rationale: that its freedom-of-choice plan was working and its schools were not segregated; and that its school segregation had nothing to do with discrimination or its past operation of a dual school system.

Petitioners cannot seriously contend that their schools were not substantially segregated at the time this action was commenced. In the 1970-71 school year, 13 of the system's 39 schools were virtually all-black.[2] Petitioners' counsel as much as conceded that freedom of choice had been inadequate at the District Court hearing of June 16, 1971 when he said:

> . . . if the sole basis for determining whether the freedom of choice plan is valid in Newport News is a racial

[2] The failure of the freedom-of-choice plan to produce meaningful results led the Department of Health, Education and Welfare to conduct enforcement proceedings under Title VI of the Civil Rights Act of 1964 for the purpose of terminating federal financial assistance to the school district. *See* n. 1, *supra*.

> black-white ratio question, then we would agree that it has no chance of passing. (A. 7)[3]

Of course, this Court held in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430, 441 (1968), that where freedom-of-choice plans had produced results comparable to those in Newport News—in terms of numbers—then the availability of alternatives promising greater desegregation—again in terms of numbers—must be explored.[4] The District Court in this case was clearly correct in rejecting a continuation of freedom of choice where the Board itself submitted a feasible alternative plan which promised full desegregation *at once.*

Petitioners were equally unsuccessful below in establishing that the 1970 segregation in their schools was unrelated to their previous operation of a dual school system.[5] To meet their burden under *Swann*, 402 U.S. at 26, they presented only the testimony of the School Superintendent,[6]

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[3] Citations are to the printed Appendix in the Court of Appeals.

[4] The notion that *Green* and *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) were limited in application to small, rural school systems, (Petition, p. 20), was laid to rest in *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970).

[5] Obviously, they could not contend that at some time between 1957 and 1970 they had implemented an efficacious plan and had "achieved full compliance with this Court's decision in *Brown I*." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra*, 402 U.S. at 31. The only desegregation device ever employed in Newport News, freedom of choice, was concededly inadequate under the standards of *Green*.

[6] The Petition asserts that the Superintendent was qualified as a historical expert for the purpose of his testimony but no such representation was made to the District Court. The entire expert "qualification" is as follows:

> Q. Mr. McIntosh, do you know of anyone else that knows any more or as much about the Newport News School System as you do? A. No, sir.

who claimed that the racial characteristics of student enrollments in Newport News public schools were determined solely by long-standing patterns of racial residential concentration. The Superintendent did not and could not testify that Newport News had not operated a dual school system, but he ignored the continuing effect of the long-standing practice of faculty and pupil segregation as well as school site location and other policy decisions made with full knowledge of the residential segregation. *See Swann*, 402 U.S. at 20-21.[7]

Residential segregation in Newport News antedates this lawsuit, and the School Board was well aware of it in designing its segregated "neighborhood" zones. But desegregation plans "cannot be limited to the walk-in school," *Swann*, 402 U.S. at 30. The existence of continuing or even changing patterns of residential segregation in a school district which has never acted affirmatively to effectively dismantle its racially segregated system does not alter the constitutional obligation of school authorities. *E.g., Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); *Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 744 (6th Cir.), *cert. denied*, 41 U.S.L.W. 3254 (1972); *Clark* v. *Board of Educ.*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); *Dowell* v. *Board of Educ.*,

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Mr. Beale: If your Honor please, I tender the witness as an expert in the educational field—

The Court: Yes.

Mr. Beale: —and, in particular, upon the Newport News School System.

The Court: You may proceed. (A. 28).

[7] The Superintendent's denial that today's segregation in the Newport News public schools relates to yesterday's racial discrimination is essentially the same as the characteristic denial of discrimination voiced by jury commissioners. *See Norris* v. *Alabama*, 294 U.S. 587, 598 (1935); *Turner* v. *Fouche*, 396 U.S. 346, 361 n. 21 (1970), and cases cited.

465 F.2d 1012 (10th Cir.), *cert. denied,* 41 U.S.L.W. 3313 (1972); *Flax* v. *Potts,* 464 F.2d 865 (5th Cir.), *cert. denied,* 41 U.S.L.W. 3274 (1972).

II.

Petitioners also claim that inadequate traffic arteries in Newport News are so congested that no desegregation plan involving the transportation of students at the elementary level could properly have been ordered by the District Court.

The pairing plan for elementary school grades 3-7 has been in effect for a year and a half in Newport News; yet on no occasion has the school district encountered the grave and serious problems which it told the District Court it was anticipating with the pupil transportation required to desegregate its schools. The school district has not found it necessary to request any modification of the plan based on practical problems it was actually encountering in implementation. Thus, this case is much like *Kelley* v. *Metropolitan County Bd. of Educ., supra,* and *Flax* v. *Potts, supra,* in which school boards sought to attract attention with inflated claims of danger and chaos which simply did not materialize when desegregation plans were carried out.

The Court of Appeals considered Petitioners' arguments[8] in great detail and with considerable sympathy but found nothing to suggest the District Court had erred in requiring implementation of an elementary school desegregation

[8] The cases relied upon by Petitioners are inapposite. *Ross* v. *Eckels,* 434 F.2d 1140 (5th Cir. 1970) was a pre-*Swann* decision consistent with *Davis* v. *Board of School Comm'rs,* 430 F.2d 883, 889 (5th Cir. 1970), *rev'd* 402 U.S. 33 (1971). The District Court decision in *Calhoun* v. *Cook* has been reversed, No. 72-2453 (5th Cir., November 24, 1972).

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plan involving pupil transportation for grades 3-7; the Court said "the objections of the school district are without merit."

During the 1970-71 school year, preceding implementation of the District Court's order, the system transported 22,000 of its 31,500 students, including 12,900 elementary students (A. 50,129); as the District Court noted, many school buses in Newport News were already crossing the "dangerous intersections" which Petitioners contend here, and contended below, are so unsafe that a desegregation plan requiring a school bus to traverse them ought not be effected.

The district courts retain jurisdiction in school desegregation cases, *Raney* v. *Board of Educ.*, 391 U.S. 443 (1968), and like any courts of equity, *Swann, supra,* their decrees are always subject to modification. If the School Board is experiencing great difficulty in implementing the District Court's order, it should take the matter up with that Court; its failure to do so for a year and a half thoroughly supports the action of the District Court in requiring desegregation.

III.

Finally, Petitioners contended below that since pupil transportation was necessary, elementary schools should not be desegregated because the additional time required would be harmful to the health of young children.

Although 12,900 elementary students in Newport News were already bused (to segregated schools), Petitioners did not differentiate between potential harm to these children and to those students who previously walked to class. Instead, they presented the testimony of a pediatrician, in

general practice for five years, who responded to a hypothetical question based upon the *average system-wide travel time* under Petitioners' plan, and recommended rest or nap periods for younger children (A. 60).[9] He was unfamiliar with the details of the plan or the amounts of time elementary pupils spent getting to school prior to desegregation (A. 65).

The District Court found the testimony unconvincing (A. 149) but decided to exempt first- and second-graders on its own:

> . . . the reason that I think it is important to keep children in the first and second grades in the neighborhood area is that *while it is not supported by any testimony in this case,* I am old-fashioned enough to think that it is vitally important that a child, starting his or her public education, should commence the same with some degree of happiness and satisfaction, including some degree of comfort on the part of the parent . . . (A. 150) (emphasis added).

The Court of Appeals remanded with instructions that further findings were necessary to support the District Court's action, noting with respect to the "medical" testimony that if "there is any credible evidence along this line developed on remand, the District Court may give such consideration to it as it finds is warranted," 465 F.2d at 88, n.7.[10]

Petitioners' complaint apparently is that the Courts below should have refused to order any elementary desegregation on the basis of the evidence that long school days

[9] The school system schedules rest periods for first and second graders (A. 68).

[10] Thus, there is no need for this Court to review the issue until it is finally resolved below.

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without sufficient rest periods might be detrimental to the health of young children—even though that opinion was not linked to the additional transit time required of specified students or groups of students but was advanced as equally affecting all pupils. We think the Court of Appeals was more than justified in remanding—and in fact should properly have directed inclusion of the first two grades. The general principle recognized in all of the Circuits which have decided the question is that desegregation plans must affect all grades absent compelling justification for specific exemption. *E.g., Flax* v. *Potts, supra; Clark* v. *Board of Educ.*, 465 F.2d 1044 (8th Cir. 1972), *cert. pending.*

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents respectfully pray that the Writ be denied.

Respectfully submitted,

HENRY L. MARSH, III
S. W. TUCKER
JAMES W. BENTON, JR.
214 East Clay Street
Richmond, Virginia 23219

PHILIP S. WALKER
1715 25th Street
Newport News, Virginia 23607

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents